Supreme Court, U.S.
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No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2001

WILLIAM J. FLEMING,

Petitioner,

v.

UNITED STATES,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Daniel M. Schember
Gaffney & Schember, P.C.
1666 Connecticut Avenue, N.W.
Suite 225
Washington, D.C. 20009
202/328-2244

August 2, 2002

Counsel of Record for Petitioner

QUESTION PRESENTED

Is termination of a National Guard technician's federal civilian employment "for cause," 32 U.S.C. § 709(f)(2), subject to review in the United States Court of Federal Claims under the Back Pay Act?

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OPINION AND ORDER

The appellate opinion and trial court order--which followed an indistinguishable case, *Booth v. United States*, 990 F.2d 617 (Fed. Cir. 1993)--are unreported.

JURISDICTION

The judgment sought to be reviewed was entered February 27, 2002. Rehearing was denied May 6, 2002. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

5 U.S.C. § 701 (excerpt)

(a) This chapter applies . . . except to the extent that--(1) statutes preclude judicial review.

(b) For the purpose of this chapter--(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency.

5 U.S.C. § 702 (excerpt)

A person suffering legal wrong because of agency action, or adversely affected . . . by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

5 U.S.C. § 703 (excerpt)

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy

thereof, any applicable form of legal action . . . in a court of competent jurisdiction.

5 U.S.C. § 704 (excerpt)

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review.

5 U.S.C. § 706 (excerpt)

The reviewing court shall . . . (2) hold unlawful and set aside agency action, findings, and conclusions found to be--(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; . . .(C) in excess of statutory . . . authority, or limitations, or short of statutory right; . . . (E) unsupported by substantial evidence.

Back Pay Act, 5 U.S.C. §5596(b)(1) (excerpt)

An employee of an agency who, on the basis of a timely appeal . . . is found by appropriate authority under applicable law . . . to have been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal . . . of the pay . . .of the employee--(A) is entitled . . . to receive . . . (i) an amount equal to . . . the pay . . . which the employee normally would have earned . . . if the personnel action had not occurred, less any amounts earned by the employee through other employment. . . .

5 U.S.C. § 7511(b)(5)

This subchapter does not apply to an employee . . . (5) who is described in section 8337(h)(1), relating to technicians in the National Guard.

5 U.S.C. § 8337(h)(1) (excerpt)

an individual employed under section 709(a) of title 32 who . . . is required . . . to be a member of the National Guard.

Tucker Act, 28 U.S.C. § 1491(a)(1) (excerpt)

The . . . Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded . . . upon . . . any Act of Congress or any regulation of an executive department, . . . or for liquidated or unliquidated damages in cases not sounding in tort.

32 U.S.C. § 709 (excerpt)

(a) Under regulations prescribed by the Secretary . . . and subject to subsections (b) and (c), persons may be employed as technicians in--(1) the administration and training of the National Guard; and (2) the maintenance and repair of supplies issued to the National Guard or the armed forces.

(b) Except as authorized in subsection (c), a person employed under subsection (a) must . . . (2) Be a member of the National Guard. . . .

(d) The Secretary . . . shall designate the adjutants general . . . to employ and administer the technicians. . . .

(e) A technician employed under subsection (a) is an employee of the Department of the Army or the Department of the Air Force, as the case may be, and an employee of the United States. However, a position authorized by this section is outside the competitive service if the technician employed in that position is required under subsection (b) to be a member of the National Guard.

(f) Notwithstanding any other provision of law and under regulations prescribed by the Secretary . . . (2) a technician may . . . be separated from his technician employment for cause by the adjutant general of the jurisdiction concerned; . . . (4) a right of appeal which may exist with respect to paragraph . . . (2) . . . shall not extend beyond the adjutant general of the jurisdiction concerned. . . .

(g) Sections 2108, 3502, 7511, and 7512 of title 5 do not apply to a person employed under this section.

STATEMENT OF THE CASE

Fleming was employed under 32 U.S.C. § 709(a) as an Arizona Army National Guard technician. Under § 709(e) he was "an employee of the Department of the Army . . . and an employee of the United States." The Adjutant General separated Fleming "for cause" under § 709(f)(2).

Fleming filed suit in the United States Court of Federal Claims, seeking reinstatement and back pay. He alleged that his separation was contrary to regulatory requirements; not "for cause"; "unwarranted and unjust," 5 U.S.C. § 5596(b)(1) (Back Pay Act); "arbitrary, capricious, an abuse of discretion, . . . not in accordance with law, . . . in excess of statutory . . . authority, or limitations, or short of statutory right; . . . [and] unsupported by substantial evidence." 5 U.S.C. § 706. The Court of Federal Claims had jurisdiction under 28 U.S.C. § 1491(a)(1) (Tucker Act).

Following *Booth v. United States*, 990 F.2d 617 (Fed. Cir. 1993), an indistinguishable case, the courts below dismissed Fleming's complaint. In *Booth* the court said that title 32 technicians were excluded from title 5 administrative and judicial adverse action review provisions by 5 U.S.C. §

7511(b)(5), a statute enacted in 1990,[1] and that under *Fausto v. United States*, 484 U.S. 439 (1988), the 1990 law implicitly eliminated all judicial review of technician separations for cause.

Section 7511(b)(5), however, did not create a new exclusion of technicians from title 5 adverse action review channels. Since 1968, 32 U.S.C. § 709 has excluded all title 32 technicians from title 5 adverse action administrative review provisions, and judicial review rights tied to those provisions, and has limited administrative review of technician personnel actions to appeals to the adjutants general. National Guard Technicians Act of 1968, P.L. 90-486, 82 Stat. 755 (August 13, 1968) (§§ 709(e)(5) and 709(f); *see Chaudoin v. Atkinson*, 494 F.2d 1323, 1325 n. 1 (3rd Cir. 1974)).[2]

The legislative history of the 1990 law expressly stated that § 7511(b)(5) made no change. H.R. Rep. No. 101-328 (1st Sess. 1989) at 5. Section 7511(b)(5) was enacted because it "is consistent with section 709(f) [now 709(g)] of title 32, . . . which states that sections 7511 and 7512 of title 5 do not apply to National Guard technicians." *Id.* at 7. The 1990 law made no change as to technicians because doing so would have required approval by the Committee on Armed Services, which also has jurisdiction over technicians. *Id.* at 5. The Committee on Post Office and Civil Service, which reported out the bill, did not want to

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[1] P.L. 101-376, § 2(a), 104 Stat. 461 (August 17, 1990).

[2] The exclusion from these title 5 provisions and the limitation of administrative review to appeal to the adjutant general, both found in the 1968 Act and continuously in force ever since, currently are codified in § 709(g) and § 709(f)(4), respectively.

delay enactment of the law "to work out legislation acceptable to" the Armed Services committee. *Id.*[3]

Before 1990, and before *Booth*, courts had held that terminations of technicians were subject to judicial review--in district court, and by suit in the Court of Claims under the Back Pay Act. *Polos v. United States*, 621 F.2d 385 (Ct. Cl. 1980); *Diluigi v. Kafkalas*, 584 F.2d 22 (3rd Cir. 1978); *Morris v. McCaddin*, 553 F.2d 866 (4th Cir. 1977); *Chaudoin v. Atkinson*, 494 F.2d 1323 (3rd Cir. 1974); *Davis v. Vandiver*, 494 F.2d 830 (5th Cir. 1974). The *Booth* opinion mentioned neither these cases nor the 1989 House Report, and showed no awareness that § 7511(b)(5) was a redundant provision the substance of which had been included in § 709 ever since 1968.

ARGUMENT

I

The decision below conflicts with those of other circuits

The decision below conflicts with *Diluigi v. Kafkalas*, 584 F.2d 22 (3rd Cir. 1978); *Morris v. McCaddin*, 553 F.2d 866 (4th Cir. 1977); *Chaudoin v. Atkinson*, 494 F.2d 1323 (3rd Cir. 1974); and *Davis v. Vandiver*, 494 F.2d 830 (5th Cir. 1974). All of these cases held that termination of a title 32 technician is subject to judicial review.

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[3] The House Report indicates that technicians had asked the committee to provide them Merit Systems Protection Board (MSPB) review rights. *Id.* Grant of this request would have afforded technicians administrative review by a board independent of their employer, so that technicians' first opportunity for independent review would not have to be in a court--an expensive forum that requires a lawyer, rather than, for example, a union representative.

Title 32 technicians are tenured civil servants who have a constitutionally protected property interest in their employment. *Cleveland Board of Education v. Loudermill*, 471 U.S. 532 (1985); *Tennessee v. Dunlap*, 426 U.S. 312, 319 (1976) (noting property interest created by § 709 requirement of "cause" for separation). Their entitlement to judicial review of termination for cause is an important question which should be resolved by this Court.

II

The decision below conflicts with this Court's opinions

The decision below is inconsistent with *Fausto v. United States*, 484 U.S. 439 (1988), and legal standards on preclusion of judicial review. *Block v. Community Nutrition Institute*, 467 U.S. 340, 351 (1984) (presumption of judicial review not overcome where doubt exists about congressional intent to preclude review); *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967) (presumption of judicial review overcome only by clear and convincing evidence of intent to preclude it).

In *Booth v. United States*, 990 F.2d 617 (Fed. Cir. 1993), the court, without examination of legislative history or other statutory provisions, held that exclusion of title 32 technicians from title 5 adverse action review provisions constitutes denial of judicial review through other channels. This was error.[4]

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[4] Section 7511(b)(6) of title 5, enacted with § 7511(b)(5), the provision in *Booth*, excludes Foreign Service employees from title 5 review provisions; yet Foreign Service employees are entitled to judicial review of their separations. 22 U.S.C. §§ 4131-4140. Mere absence of a special title 32 review provision, moreover, does not by itself support an inference that review of technician separations is

Contrary to the decision below, App. 3a, the *Booth* decision does not "implement" the reasoning of *Fausto v. United States*, 484 U.S. 439 (1988), regarding the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 *et seq.* (October 13, 1978) (CSRA). Plaintiff in *Fausto*, who had been suspended from his job, was a "disfavored" title 5 employee--a "nonpreference member of the excepted service." 484 U.S. at 450 and 440, n. 1. (A "nonpreference" employee is one who is neither a military veteran nor closely related to a military veteran. *Id.* at 440, n. 1.) For several reasons, the *Fausto* Court found that the CSRA's exclusion of disfavored title 5 employees from the adverse action review provisions applicable to preferred title 5 employees--those in the competitive service and preference eligibles in the excepted service--"establish[ed] a congressional judgment that [the disfavored] employees should not be able to demand judicial review" under the Back Pay Act. *Id.* at 448.

The Court cited "the comprehensive nature of the CSRA," 484 U.S. at 448, which "comprehensively overhauled the [title 5] civil service." *Id.* at 443 (*quoting Lindahl v. OPM*, 470 U.S. 768, 773 (1985)). The Court stressed "the attention that [the CSRA] gives throughout to the rights of [title 5] nonpreference excepted service employees" compared to those of title 5 competitive service

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precluded. 5 U.S.C. § 703 ("form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute *or, in the absence* or inadequacy *thereof, any applicable form of legal action . . . in a court of competent jurisdiction*"; emphasis added); § 704 ("action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review").

and preference eligible excepted service employees. *Id.* at 448.

The Court said that 5 U.S.C. § 7511(c) "specifically provided for optional inclusion (at the election of [the Office of Personnel Management (OPM)] of certain [title 5] nonpreference excepted service employees [including Fausto] with respect to certain protections of the chapter, including [Merit Systems Protection Board (MSPB)] and judicial review." 484 U.S. at 448. The Court noted that OPM had declined to exercise its option to include Fausto's group. *Id.*

The Court stated that allowing disfavored title 5 employees review under the Back Pay Act would have the perverse effect of granting them more rights than preferred title 5 employees, since it would afford them review of short suspensions, a right which preferred title 5 employees do not have. 484 U.S. at 449-50. This "inverted preference" the Court held, "would seriously undermine" the "primacy of the MSPB for administrative resolution of disputes over adverse personnel action." Id. at 450, 449.

Based on these factors, the Court concluded "that the absence of provision for [title 5 nonpreference excepted] employees to obtain judicial review [of adverse action] is not an uninformative consequence of the limited scope of the statute, but rather manifestation of a considered congressional judgment that they should not have statutory entitlement to review." *Id.* at 448-449. Having found congressional intent to foreclose all judicial review, the Court held that after enactment of the CSRA the Court of Claims no longer was an "appropriate authority" to decide title 5 nonpreference excepted employees' Back Pay Act challenges to adverse actions. *Id.* at 454.

The inference of congressional intent to preclude judicial review drawn in *Fausto* with respect to disfavored title 5 employees cannot properly be drawn as to title 32 technicians. The personnel system that the CSRA comprehensively overhauled was the title 5 system, not the system applicable to title 32 employees. The CSRA is not "comprehensive" with respect to title 32 technicians. Many of the personnel laws applicable to technicians, including the provisions concerning adverse actions, are established by 32 U.S.C. § 709, which the CSRA did not address.

While the CSRA gave "attention throughout" to the different categories of title 5 employees, it did not mention title 32 technicians at all. Further, petitioner has found no evidence that development of the CSRA in the House Committee on Post Office and Civil Service was coordinated with the House Committee on Armed Services. Courtesy would have required this coordination if the CSRA had been intended to change technician adverse action law. H.R. Rep. No. 101-328 (1st Sess. 1989) at 5.

Unlike Fausto's group, title 32 technicians are not "disfavored" employees. Like the preferred title 5 employees referenced in the *Fausto* opinion, *see* 5 U.S.C. § 7513, and unlike disfavored title 5 employees, title 32 technicians are tenured federal employees who, with exceptions inapplicable here, may be separated only "for cause." 32 U.S.C. § 709(f)(2).

The exclusion of title 32 employees from review channels applicable to title 5 employees does not support an inference that title 32 employees are entitled to no administrative or judicial review. Rather, it reflects that title 32 employees' review channels are different from those of title 5 employees, as has been the case since well before

enactment of the CSRA. The "primacy of the MSPB for administrative resolution of disputes over adverse personnel action," *Fausto*, 484 U.S. at 449, is primacy only with respect to title 5 employees, not title 32 technicians (or foreign service employees). Under 32 U.S.C. § 709(f)(4), the adjutants general have primacy for administrative resolution of title 32 technician adverse actions.

Section 709(f)(4) limits administrative review of title 32 technician adverse actions to the adjutants general. This law therefore precludes other administrative review of these actions. *AFGE Local 3936 v. FLRA*, 239 F.3d 66 (1st Cir. 2001). But neither § 709(f)(4), nor any other provision, precludes judicial review of an adjutant general's decision to separate a technician for cause. *See Chaudoin v. Atkinson*, 494 F.2d 1323, 1327 n. 5 (3rd Cir. 1974).

A presumption that judicial review is available applies to technician claims of unlawful separation. *Fausto*, 484 U.S. at 452 (*citing Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967)). This presumption may be rebutted only by "clear and convincing" evidence of congressional intent to deny review. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967). There is no clear and convincing evidence that Congress, in enacting the Technicians Act, intended to preclude judicial review. The legislative history of the Act, S. Rep. No. 90-1446 (2d Sess. 1968), does not mention judicial review. *Compare, e.g., United States v. Erika, Inc.*, 456 U.S. 201 (1982) (intent to preclude review found where statute provided review of some but not all agency decisions and legislative history included explicit statement that review was limited). Where there is "substantial doubt about the congressional intent, . . . the general presumption favoring judicial review of administrative action is

controlling." *Block v. Community Nutrition Institute*, 467 U.S. 340, 351 (1984).

No clear and convincing evidence of congressional intent to deprive separated technicians of their previously recognized right to judicial review can be gleaned from the CSRA's overhaul of the review rights of title 5 employees. The factors which the *Fausto* Court found to be persuasive evidence of deliberate congressional intent to foreclose judicial review of the separations of title 5 nonpreference excepted service members do not apply to the terminations of tenured title 32 technicians. And the legislative history of the 1990 provision invoked in *Booth* expressly states that Congress intended to make no change regarding review of technician separations. In 1990, as well as in 1978, when the CSRA was enacted, case law afforded technicians judicial review. *Polos v. United States*, 621 F.2d 385 (Ct. Cl. 1980); *Diluigi v. Kafkalas*, 584 F.2d 22 (3rd Cir. 1978); *Morris v. McCaddin*, 553 F.2d 866 (4th Cir. 1977); *Chaudoin v. Atkinson*, 494 F.2d 1323 (3rd Cir. 1974); *Davis v. Vandiver*, 494 F.2d 830 (5th Cir. 1974). Nothing, let alone clear and convincing evidence, indicates that Congress intended in 1978 or 1990 to overrule these precedents.

Since termination of a title 32 technician is not a personnel action covered by the CSRA, and review of a technician's termination is not precluded by any other law, the Court of Federal Claims is an "appropriate authority" under the Back Pay Act to determine whether a technician has suffered loss of pay by "unjustified or unwarranted" separation. 5 U.S.C. § 5596(b)(1). *Worthington v. United States*, 168 F.3d 24 (Fed. Cir. 1999) (pay withheld in violation of Compressed Work Schedules Act not covered by CSRA; therefore, Court of Federal Claims an

"appropriate authority" under Back Pay Act to redress violation); *Romero v. United States*, 38 F.3d 1204, 1211 (Fed. Cir. 1994) (same; pay unlawfully withheld for taxes); *Zervas v. United States*, 26 Cl. Ct. 1425, 1428 (1992) (same; unlawfully denied grade and pay retention benefits); *Bailey v. United States*, 52 Fed. Cl. 105, 113 (2002) (same; unlawful denial of travel reimbursements).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Daniel M. Schember
Gaffney & Schember, P.C.
1666 Connecticut Ave., N.W.
Suite 225
Washington, D.C. 20009
202/328-2244

Counsel of Record for Petitioner

August 2, 2002

APPENDIX

NOTE: Pursuant to Fed. Cir. R. 47.6, this disposition is not citable as precedent. It is a public record. This disposition will appear in tables published periodically.

United States Court of Appeals for the Federal Circuit

01-5111

WILLIAM J. FLEMING,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

DECIDED: February 27, 2002

Before NEWMAN, RADER, AND SCHALL, Circuit Judges

PER CURIAM.

William J. Fleming seeks review of the decision of the United States Court of Federal Claims dismissing his appeal for lack of subject matter jurisdiction. *William J. Fleming v. United States*, No. 00-CV-517 (Fed. Cl. Apr. 13, 2001). We *affirm*.

DISCUSSION

Mr. Fleming was a technician for the Arizona Army National Guard, employed pursuant to 32 U.S.C. § 709(a). On September 12, 1997, the National Guard terminated Mr. Fleming's employment based on allegations of wrongdoing. The termination decision by the Deciding Official, Col. Gluski, had been reviewed by an administrative hearing examiner (Lt. Col. Pennington), and the Arizona Adjutant General, Maj. Gen. Van Dyke. Mr. Fleming appealed to the Court of Federal Claims. Relying in part on *Booth v. United States*, 990 F.2d 617 (Fed. Cir. 1993), the court held that the Civil Service Reform Act of 1978 ("CSRA") denies judicial review to National Guard technicians.

In *Booth* this court held that a National Guard technician employed pursuant to 32 U.S.C. § 709 is not entitled to judicial review of an adverse personnel action, relying on the Supreme Court's interpretation of the CSRA in *United States v. Fausto*, 484 U.S. 439 (1988). *Booth*, 990 F.2d at 619. Specifically, in *Booth*, this court found that the CSRA denies judicial review to technicians employed under § 709(a) who, as a condition of employment, are required by § 709(b) to be a member of the National Guard and to hold a specified military grade. *Id.* at 619-20 (citing 5 U.S.C. §§ 7511(b)(5), 8337(h)(1)). The Court of Federal Claims also held that the Administrative Procedure Act does not provide an independent basis of jurisdiction of an appeal by a National Guard technician, and declined to transfer the appeal to a district court.

Mr. Fleming can not distinguish his appeal from the facts and law of *Booth*. Instead, he argues that *Booth* was wrongly decided and should be overruled. However, *Booth*

implements the Court's reasoning in *Fausto*, wherein the Court held that the major restructuring of federal employment rights implemented by the CSRA does not include alternative paths of appeal for those few classes of employees for which Congress expressly denied appeal rights to the Merit Systems Protection Board. Since National Guard technicians were expressly excluded from access to judicial review, while provided with a system of review within the National Guard structure, the Court of Federal Claims correctly held that judicial review under the Tucker Act and the Back Pay Act is not available to National Guard technicians.

No costs.

In the United States Court of Federal Claims

No. 00-517C
(Filed April 13, 2001)

WILLIAM J. FLEMING,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

Daniel Schember, Washington, D.C., attorney of record for plaintiff.

David Frank D'Alessandris, Department of Justice, Washington, D.C., with whom was Assistant Attorney General *David W. Ogden*, for defendant. *David M. Cohen*, Director, and *Deborah A. Bynum*, Assistant Director.

OPINION

Futey, JUDGE.

This civilian pay case is before the court on defendant's motion to dismiss. Defendant maintains this court lacks jurisdiction over plaintiff's claims because the Back Pay Act does nto authorize this court to adjudicate the merits of an underlying personnel action. Defendant also contends the Administrative Procedure Act (APA) is inapplicable. Plaintiff asserts jurisdiction under the court's interpretation

of the Back Pay Act in *Walker v. United States*, 40 Fed. Cl. 666 (1998).

Factual Background

Plaintiff is William J. Fleming, a former technician for the Arizona Army National Guard at the Western Army Aviation Training Site (WAATS) located in Marana, Arizona.[1] Prior to March 19, 1997, plaintiff signed a letter written on WAATS letterhead requesting possession of Platform Utility Trucks, commonly referred to as "mules." These mules were from the Gila Bend target yard, and plaintiff asserts they were deemed junk because none were intact and none had been operated for over a year. Plaintiff maintains the mules were sent to Gila Bend with the understanding that they would be destroyed during target practice.

Plaintiff contends his supervisor told him to "get rid of" these mules because they were too small for target practice. He took five of them home, gave others to his colleagues, and repaired some of them by using parts from others. These modifications included removing data plates, an act defendant maintains proves plaintiff intended not to return the mules to the government. Plaintiff kept the vehicles in his possession for several months.

On March 19, 1997, plaintiff received a "Notice of Proposal to Terminate" from his supervisor, Major Todd

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[1] As stated in the complaint and as clarified in an April 11, 2001 telephonic conference with the parties, plaintiff's employment was pursuant to 32 U.S.C. § 709(b). A person employed under this section as a civilian technician must also be a member of the National Guard. Plaintiff's counsel emphasized during the telephonic conference that plaintiff was not removed from the National Guard when he was terminated from his civilian technician position.

Bailey, containing allegations that plaintiff misrepresented his command and standing within WAATS when he used WAATS letterhead to request the mules. The notice also alleged plaintiff took the trucks home and removed data plates with no intent of returning the property to the government. Plaintiff's attorney submitted a response on April 1, 1997. Plaintiff provided written and oral responses to the proposed termination on April 10, 1997.

On April 12, 1997, the Deciding Official, Colonel George J. Gluski, issued a decision terminating plaintiff's employment effective April 21, 1997. This decision cited several reasons for the separation, including plaintiff's failure to follow regulatory procedures for acquiring government property, and his use of letterhead to justify acquisition of the vehicles without prior authorization.

Plaintiff filed a timely request for an administrative hearing following receipt of Colonel Gluski's decision. This hearing was held on June 18 and 19, 1997, and was conducted by Lieutenant Colonel David Pennington, a hearing examiner from Nevada. After the hearing, Lieutenant Colonel Pennington prepared a report of findings and recommendations, where he concluded by a preponderance of the evidence that plaintiff committed the offenses of stealing and wrongful appropriation of government property. He also determined that plaintiff's termination was not arbitrary, capricious or unreasonable. On July 7, 1997, Lieutenant Colonel Pennington forwarded this report to the adjutant general, Major General Glen Van Dyke.

On September 12, 1997, General Van Dyke accepted Lieutenant Colonel Pennington's findings and terminated plaintiff's employment as a technician. In doing so, General

Van Dyke reviewed the findings of the WAATS commander's investigation, the Defense Criminal Investigation Service reports, and Lieutenant Colonel Pennington's report. He also considered plaintiff's submissions. Plaintiff contends General Van Dyke's memorandum included no comparison of plaintiff's conduct with that of his colleagues, who only received three-day suspension, and no statement that plaintiff's termination was appropriate in light of the lesser penalties his colleagues received.

On August 28, 2000, plaintiff filed a complaint with the court stating his termination was arbitrary, capricious, an abuse of discretion, not in accordance with law, in excess of statutory authority and limitations, short of statutory rights, and unsupported by substantial evidence. Plaintiff requests: (1) reinstatement to his technician employment with back pay and interest; (2) reasonable attorney's fees and costs; (3) correction of his employment records, including expungement of the records of his termination; and (4) any alternative relief the court deems just. Instead of submitting an answer, defendant filed a motion to dismiss on November 16, 2000, claiming this court lacks subject matter jurisdiction over plaintiff's claim and that plaintiff has failed to state a claim upon which relief may be granted because the Back Pay Act, Tucker Act, and APA are inapplicable. In a response submitted December 18, 2000, plaintiff maintains the Back Pay Act as interpreted in *Walker* does provide jurisdiction in this case. Neither party has requested oral argument.

Discussion

Defendant's motion to dismiss is based on RCFC 12(b)(1) for lack of subject matter jurisdiction and RCFC

12(b)(4) for failure to state a claim upon which relief may be granted.[2] In ruling on a motion to dismiss for lack of subject matter jurisdiction, the court must accept as true the complaint's undisputed factual allegations and construe them in a light most favorable to plaintiff. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); *Hamlet v. United States*, 873 F.2d 1414, 1415 (Fed. Cir. 1989); *Farmers Grain Co. v. United States*, 29 Fed. Cl. 684 686 (1993). If the undisputed facts reveal any possible basis on which the non-moving party may prevail, the court must deny the motion. *Scheuer*, 416 U.S. at 236; *W.R. Cooper Gen. Contractor, Inc. v. United States*, 843 F.2d 1362, 1364 (Fed. Cir. 1988). If the motion challenges the truth of the jurisdictional facts alleged in the complaint, however, the court may consider relevant evidence in order to resolve the factual dispute. *Rocovich v. United States*, 933 F.2d 991, 994 (Fed. Cir. 1991). "The court should 'look beyond the pleadings and decide for itself those facts, even if in dispute, which are necessary for a determination of [the] jurisdictional merits.'" *Farmers Grain*, 29 Fed. Cl. at 686 (citing *Raymark Industries, Inc. v. United States*, 15 Cl. Ct. 334, 335 (1988)). Plaintiff bears the burden of establishing subject matter jurisdiction. *KVOS, Inc. v. Assoicated Press*, 299 U.S. 269 (1936); *Rocovich*, 933 F.2d at 993.

In the alternative, the court will dismiss plaintiffs' case under RCFC 12(b)(4) for failure to state a claim upon which relief may be granted only if it appears beyond a doubt that

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[2] Although defendant moves to dismiss for failure to state a claim pursuant to RCFC 12(b)(6), the court assumes defendant intends to make its motion pursuant to RCFC 12(b)(4). Unlike the Federal Rules of Civil Procedure, the Rules of the Court of Federal Claims do not contain a Rule 12(b)(6). Its counterpart is RCFC 12(b)(4) for failure to state a claim. *Hamlet v. United States*, 873 F.2d 1414, 1416 (Fed. Cir. 1989).

plaintiff has not alleged facts sufficient to support its claim. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Mostowy v. United States*, 966 F.2d 668, 672 (Fed. Cir. 1992). Also, the court must accept as true the complaint's undisputed factual allegations and should construe them in a light most favorable to the plaintiff. *Papasan v. Allain*, 478 U.S. 265, 283 (1986) (citing *Scheuer*, 416 U.S. at 236); *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991). Furthermore, all that is required to withstand a motion to dismiss is "'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Gould, Inc.*, 935 F.2d at 1276 (citing *Conley*, 355 U.S. at 47).

It is well-established that this court is one of limited jurisdiction. *United States v. Testan*, 424 U.S. 392, 397-98 (1976); *United States v. King*, 395 U.S. 1, 3 (1969); *Dynalectron Corp. v. United States*, 4 Cl. Ct. 424, 428, *aff'd*, 758 F.2d 665 (Fed. Cir. 1984). The court's jurisdiction to entertain claims and to grant relief extends only so far as the United States has waived its sovereign immunity from suit. *Testan*, 424 U.S. at 399 (citing *United States v. Sherwood*, 312 U.S. 584, 586 (1941)); *Booth v. United States*, 990 F.2d 617, 619 (Fed Cir. 1993). The waiver of sovereign immunity must be expressed unequivocally and cannot be implied. *United States v. Mitchell*, 445 U.S. 535, 538 (1980); *Testan*, 424 U.S. at 399; *Zumerling v. Marsh*, 783 F.2d 1032, 1034 (Fed. Cir. 1986). Any grant of jurisdiction to this court must be strictly construed. *Mitchell*, 445 U.S. at 538 (1980); *Cosmic Constr. Co. v. United States*, 697 F.2d 1389, 1390 (Fed. Cir. 1982).

Pursuant to the Tucker Act, this court has

> jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

28 U.S.C. § 1491(a)(1) (1994). The Tucker Act, however, is "only a jurisdictional statute; it does not create any substantive right enforceable against the United States for money damages." *Testan*, 424 U.S. at 398. Such a substantive right must be "grounded expressly or by implication in a contract, an act of Congress or a regulation or an executive department." *United States v. Connolly*, 716 F.2d 882, 885 (Fed. Cir. 1983), cert. denied, 465 U.S. 1065 (1984). The provisions a plaintiff relies upon in a claim based on statute or regulation must contain language which could fairly be interpreted as mandating recovery of compensation from the government. *Cummings v. United States*, 17 Cl. Ct. 475, 479 (1989), *aff'd*, 904 F.2d 45 (Fed Cir. 1990) (citations omitted).

Plaintiff maintains the Back Pay Act is a money-mandating statute that gives this court jurisdiction under the Tucker Act. Plaintiff also contends his status as a National Guard technician exempts him from the Civil Service Reform Act (CSRA), Pub. L. 95-545, 92 Stat. 1111 (1978) (codified as amended in various sections of Title 5 of the U.S. Code). Thus, plaintiff asserts the Supreme Court's decision in *Fausto v. United States*, 484 U.S. 439 (1988), which concluded this court does not have jurisdiction over back pay claims after the CSRA's enactment, is not applicable. Furthermore, plaintiff relies on this court's decision in *Walker*, which states that this court has

jurisdiction over a National Guard technician's civilian pay claims. Defendant maintains this court lacks jurisdiction to adjudicate an underlying personnel action because this court is not an appropriate authority to do so. In addition, defendant asserts this court does not have jurisdiction under the APA.

The Back Pay Act provides:

> (b) (1) An employee of an agency who, on the basis of a timely appeal or an administrative determination (including a decision relating to an unfair labor practice or a grievance) is found by appropriate authority under applicable law, rule, regulation, or collective bargaining agreement, to have been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the pay, allowances, or differentials of the employee--(A) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect--(i) an amount equal to all or any part of the pay, allowances, or differentials, as applicable which the employee normally would have earned or received during the period if the personnel action had not occurred . . . .

5 U.S.C. § 5596(b)(1). Although this statute appears to mandate monetary relief, it "is merely derivative in application; it is not itself a jurisdictional statute." *United States v. Connolly*, 716 F.2d at 887. Plaintiff must cite the court to some other money-mandating law or regulation because "the Back Pay Act itself cannot fill that gap." *Spagnola v. Stockman*, 732 F.2d 908, 912 (Fed. Cir. 1984). It is only a money-mandating statute when plaintiff's claim is

"based on violations of statutes or regulations covered by the Tucker Act." *Worthington v. United States*, 168 F.3d 24, 26 (Fed. Cir. 1999) (citing Connolly, 716 F.2d at 887). Plaintiff has not invoked any additional statutes mandating monetary relief.

Moreover, the Back Pay Act no longer provides this court jurisdiction to adjudicate the merits of an underlying personnel action. *See Fausto*, 484 U.S. at 454. Prior to the enactment of the CSRA, this court had determined it was an "appropriate authority" within the meaning of the Back Pay Act to correct unjustified personnel action. *Id.* The Supreme Court held in *Fausto*, however, that "under the comprehensive and integrated review scheme of the CSRA, the Claims Court (and any other court relying on Tucker Act jurisdiction) is not an 'appropriate authority' to review an agency's personnel determination." *Id.* The Court emphasized that the enactment of the CSRA did not mean the statutory remedy in the Back Pay Act was eliminated. *Id.* "[I]f an employee is found by an 'appropriate authority' to have undergone an unwarranted personnel action" suite for back pay will still be available. *Id.* Instead, the Supreme Court merely determined this court is not longer an appropriate authority to review unwarranted personnel action. *Id.* The agency itself or the Merit Systems Protection Board are examples of appropriate authorities. *Id.* If such appropriate authority were to determine an employee was entitled to back pay, and if the government refused to remit this compensation, this court would then have jurisdiction to hear the employee's back pay claim. *Id.*

There has not been a determination by an appropriate authority in the present case holding that plaintiff's termination was unwarranted or unjustified. Indeed, the adjutant general concluded plaintiff's termination was

proper. Plaintiff has no basis, therefore, to seek back pay in this court.

Plaintiff maintains, however, that his status as a National Guard technician exempts him from the CSRA, so the decision in *Fausto* does not apply. Plaintiff emphasizes that the CSRA is a system governing persons employed under Title 5 of the U.S. Code. National Guard technicians are employed under Title 32. Plaintiff, therefore, believes he is entitled to adjudication under the scheme in place before the CSRA's enactment--specifically, jurisdiction in this court to review his personnel action. Defendant contends plaintiff's rights of review are limited to an appeal to the state adjutant general.

Plaintiff's assertion is unpersuasive. He is correct that the CSRA specifically excludes National Guard technicians "from its channels of administrative and judicial review." *Booth*, 990 F.2d at 619.[3] This does not mean, however, that plaintiff is subject to the remedial scheme in place before the CSRA's enactment that allowed jurisdiction in this court. The Court of Appeals for the Federal Circuit (Federal Circuit) held in Booth that the CSRA expressly denies National Guard technicians judicial review in this court. *Id.* at 620. As emphasized in *Fausto*, the CSRA

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[3] In particular, § 7511(b)(5) of the CSRA "denies administrative protection, including judicial review, to an employee 'described in section 8337(h)(1) relating to technicians in the National Guard.'" *Booth*, 990 F.2d at 620. Section 8337(h)(1) defines technician as "an individual employed under section 709(a) of title 32 who, as a condition of employment, is required under section 709(b) of such title to be a member of the National Guard and to hold a specified military grade." *Id.* at 620 n.4. As clarified in a telephonic conference conducted April 11, 2001, plaintiff was employed under § 709(b). He is excluded, therefore, from the CSRA's channels of administrative and judicial review.

exclusively governs federal personnel matters. 484 U.S. at 443. Because National Guard technicians are excluded from the CSRA's administrative and judicial review options, the only review rights plaintiff has are to appeal his case to the state adjutant general. See 32 U.S.C. § 709(f)(4) ("[A] right of appeal . . . shall not extend beyond the adjutant general of the jurisdiction concerned."). Plaintiff has already done this, and the adjutant general concluded his termination was justified.

Moreover, plaintiff's jurisdictional argument based on *Walker*, 40 Fed. Cl. 666, is unconvincing. The court in *Walker* stated that "the Back Pay Act does provide the requisite jurisdictional basis for this Court to consider claims arising out of the termination of the plaintiff's civilian technician position" because the Back Pay Act is a money-mandating statute. *Id.* at 671-72.[4] This assertion is contrary, however, to the Federal Circuit decisions in *Booth* and *Connolly* discussed above.[5]

Plaintiff also appears to invoke jurisdiction pursuant to the APA, although this assertion is not absolutely clear. In his complaint, plaintiff maintains his termination was "arbitrary, capricious, an abuse of discretion, not in accordance with law, in excess of statutory authority and limitations, short of statutory right, and unsupported by substantial evidence," and he cites Section 6 of the APA.[6]

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[4] The court ultimately determined, however, that the plaintiff failed to state a claim because he did not prove his termination was unjustified or unwarranted. *Walker*, 40 Fed. Cl. at 673.

[5] A previous decision in this court is not binding precedent on a latter case. *Tech. For Communicaitons Int'l v. United States*, 22 Cl. Ct. 711, 713 (1991).

[6] Complaint at 11.

Plaintiff also lists as a headnote at the beginning of his complaint "Employment Termination Contrary to Administrative Procedure Act."[7] In the section of his complaint titled "Jurisdiction," however, plaintiff does not cite the APA.

Defendant believes plaintiff is asserting jurisdiction under the APA, so it states in its motion to dismiss "[I]t is well-established that this Court does not possess general Federal question jurisdiction pursuant to the APA."[8] Plaintiff did not address APA jurisdiction in his response brief. As a result, defendant asserts in its reply brief that plaintiff's failure to contest defendant's claim means this "portion" of the complaint should be dismissed."

This court does not have general review authority under the APA. *Ashgar v. United States*, 23 Cl. Ct. 226, 231 (1991). Also, the APA is not a money-mandating statute granting this court jurisdiction under the Tucker Act. *Id.* Indeed, "the APA is not an independent source of jurisdiction for any court." *Id.* (citing *Califano v. Sanders*, 430 U.S. 99, 105 (1977)). "Since there is no generalized authority for this Court to review agency actions, the review standard created by the APA is simply not applicable in the Claims Court." *Id.* (citations omitted). Plaintiff cannot invoke the APA, therefore, as a basis of jurisdiction.[9]

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[7] *Id.* at 1.

[8] Defendant's Motion to Dismiss at 8.

[9] In his complaint, plaintiff also requests reinstatement to his technician position. "Equitable relief, such as reinstatement . . . may only be granted if it is collateral to a judgment that is steeped in a money-mandating jurisdictional statute." *Walker*, 40 Fed. Cl. at 670 (citations omitted). As there is no money-mandating statute applicable

Conclusion

For the above-stated reasons, defendant's motion to dismiss is hereby ALLOWED. Accordingly, the Clerk is directed to dismiss plaintiff's complaint. No costs.

IT IS SO ORDERED.

/s/
BOHDAN A. FUTEY
Judge

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to this case, the court does not have jurisdiction to grant this equitable relief.

United States Court of Appeals for the Federal Circuit

01-5111

WILLIAM J. FLEMING,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

ORDER

A combined petition for panel rehearing and for rehearing en banc having been filed by the APPELLANT, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for panel rehearing be, and the same hereby is, DENEID and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on May 13, 2002.

FOR THE COURT,

/s/

Jan Horbaly
Clerk

Dated: May 6, 2002

cc: Daniel M. Schember
David D'Alessandris

FLEMING V US, 01-5111
(CFC - 00-CV-517)

Note: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. It is a public record.

Supreme Court, U.S.
FILED
NOV 8 2002
CLERK

No. 02-194

In the
Supreme Court of the United States

WILLIAM J. FLEMING, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record

ROBERT D. MCCALLUM, JR.
Assistant Attorney General

WILLIAM KANTER
DAVID M. COHEN
DAVID D'ALESSANDRIS
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the Court of Federal Claims has jurisdiction pursuant to the Tucker Act, 28 U.S.C. 1491, and the Back Pay Act of 1966, 5 U.S.C. 5596, to review the decision to terminate a National Guard technician employed pursuant to 32 U.S.C. 709.

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In the
Supreme Court of the United States

No. 02-194

WILLIAM J. FLEMING, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is unreported. The opinion of the Court of Federal Claims (Pet. App. 4a-16a) is also unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 27, 2002. A petition for rehearing was denied on May 6, 2002. Pet. App. 17a-18a. The petition for a writ of certiorari was filed on August 2, 2002. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254.

STATEMENT

1. The Civil Service Reform Act of 1978 (CSRA), 5 U.S.C. 1101 *et seq.*, "comprehensively overhauled the civil service system" to establish a "new framework for evaluating ad-

verse personnel actions against" federal employees. *United States* v. *Fausto*, 484 U.S. 439, 443 (1988) (internal quotation marks omitted). Among other things, the CSRA "prescribes in great detail the protections and remedies applicable to such action, including the availability of administrative and judicial review." *Ibid.*

Chapter 75 of the CSRA specifies the agency processes, as well as administrative and judicial review procedures, available to covered employees. Subchapter I of Chapter 75, 5 U.S.C. 7501-7504, provides that covered employees subjected to certain (less serious) adverse personnel actions are entitled to advance written notice of the proposed action, a reasonable time to answer and present evidence, to be represented by counsel or another representative, and a written decision setting forth the reasons for the action taken. 5 U.S.C. 7503(b). Subchapter II of Chapter 75, 5 U.S.C. 7511-7514, provides similar rights where the adverse action is more serious, such as where it involves removal, a suspension for more than 14 days, a reduction in grade or pay, or a furlough of 30 days or more. 5 U.S.C. 7513(b). In addition, Subchapter II provides that any covered employee subjected to those more serious adverse actions "is entitled to appeal to the Merit Systems Protection Board" or MSPB. 5 U.S.C. 7513(d). Adverse MSPB decisions, in turn, are subject to judicial review in the United States Court of Appeals for the Federal Circuit. 5 U.S.C. 7703; 28 U.S.C. 1295(a)(9). See *Fausto*, 484 U.S. at 446 (discussing CSRA procedures available to competitive service and preference eligible members of the excepted service).

Congress, however, did not make the full panoply of procedural mechanisms available to every federal employee. For example, in *Fausto*, this Court concluded that Congress had accorded "nonpreference members of the excepted service" some procedural protections, such as the right

to be heard by the agency, but had "denied them the right to seek either administrative or judicial review of the agency's final action." 484 U.S. at 446 (discussing Chapter 43, which governs personnel actions taken for unacceptable performance); *id.* at 447 (discussing Chapter 75, which governs actions taken for the "efficiency of the service"). The Court explained that the "comprehensive nature of the CSRA, the attention that it gives to the rights of non-preference excepted service employees, and the fact that it does not include them in provisions for administrative and judicial review contained in Chapter 75, combine to establish a congressional judgment that those employees should not be able to demand judicial review for the type of personnel action covered by that subchapter." *Id.* at 448.

In 1990, partially in response to this Court's decision in *Fausto*, Congress amended the CSRA by enacting the Civil Service Due Process Amendments Act (1990 Civil Service Amendments), Pub. L. No. 101-376, 104 Stat. 461. Those amendments revised Subchapter II of Chapter 75 to provide administrative and judicial review to additional categories of employees. In particular, the 1990 Civil Service Amendments extended the right to such review to any "individual in the excepted service" (like those at issue in *Fausto*) "not serving a probationary or trial period" or who "completed 2 years of current continuous service" in the relevant position. 104 Stat. 461 (codified as 5 U.S.C. 7511(a)(1)(C)). See also 104 Stat. 462 (codified as 5 U.S.C. 4303(e)(3) (extending appeal rights under 5 U.S.C. 4303(e) to employees "in the excepted service and covered by subchapter II of chapter 75")).

At the same time, Congress chose, by express exclusion, to refuse those procedures to some categories of employees. See 5 U.S.C. 7511(b) (providing that Subchapter II "does not apply to" the listed categories of employees). For example, Congress excluded from Subchapter II any em-

ployee "whose appointment is made with the advice and consent of the Senate," 5 U.S.C. 7511(b)(1); employees in certain "confidential, policy-determining" positions, 5 U.S.C. 7511(b)(2); and employees appointed by the President, 5 U.S.C. 7511(b)(3). The Act "explicitly denies procedural protections" to those employees, the House Report explained, because they "have little expectation of continuing employment beyond the administration during which they were appointed. They explicitly serve at the pleasure of the President or the presidential appointee who appointed them." H.R. Rep. No. 328, 101st Cong., 1st Sess. 5 (1989). Congress also excluded employees of the CIA, the General Accounting Office, and other agencies, 5 U.S.C. 7511(b)(7)-(b)(8), because "a separate statute excludes the employees of these agencies from the normal appeals process." H.R. Rep. No. 328, *supra*, at 5.

Finally, and most relevant here, Congress excluded National Guard technicians from the rights provided by Subchapter II.[1] Section 7511(b)(5) states that "[t]his subchapter," *i.e.*, Subchapter II, "does not apply to an employee * * * who is described in section 8337(h)(1), relating to technicians in the National Guard." The House Report explained that, "while the committee is sympathetic to the pleas for better protection the technicians have made," the committee planned "to address the issue of protection for technicians in separate legislation" to be developed in cooperation with the Committee on Armed Services. H.R. Rep. No. 328, *supra*, at 5. Parallel to Section 7511(b)(5), Section 709 of Title 32 provides that "a right of appeal which may exist with respect to" termination of a

[1] Under Section 709 of Title 32 of the United States Code (entitled "Technicians: employment, use, status"), National Guard technicians are "employee[s] of the Department of the Army or the Department of the Air Force" and "employee[s] of the United States." 32 U.S.C. 709(e).

national guard technician "shall not extend beyond the adjutant general of the jurisdiction concerned." 32 U.S.C. 709(f)(4).

2. Petitioner, William J. Fleming, was a technician with the Arizona National Guard until the Arizona Adjutant General terminated him pursuant to 32 U.S.C. 709(f)(2) for wrongfully appropriating government property. Pet. App. 5a. While petitioner was a technician, he signed a letter —on Western Army Aviation Training Site letterhead —requesting possession of certain platform utility trucks that were in the Gila Bend target yard. *Ibid.* According to petitioner, the trucks were inoperable, and his supervisor told him to "get rid" of the trucks because they were too small for target practice. Petitioner took five of the trucks home, gave others to his colleagues, and repaired some of the trucks by cannibalizing parts from others. Petitioner also removed the data plates from the trucks. *Ibid.*

On March 19, 1997, petitioner received a "Notice of Proposal to Terminate" from his supervisor, Major Bailey. Pet. App. 5a-6a. The notice alleged that petitioner had misrepresented his command and standing when he used Western Army Aviation Training Site letterhead to acquire the trucks. The notice further alleged that petitioner had taken the trucks home and removed the data plates, showing that petitioner had no intention of returning the trucks. *Id.* at 6a.

Petitioner, though his attorney, submitted a written response on April 1, 1997, and written and oral responses on April 10, 1997. Pet. App. 6a. Shortly thereafter, Colonel Gluski issued a decision terminating petitioner's employment effective April 21, 1997. The decision cited, among other things, petitioner's failure to follow regulatory procedures for acquiring government property and unauthorized use of letterhead. *Ibid.* Following that decision, petitioner sought an administrative hearing, which was held on June

18 and 19, 1997. In his report of findings and recommendations, the hearing examiner concluded that the preponderance of the evidence showed that petitioner had stolen and wrongfully appropriated government property. *Ibid.* The hearing examiner also concluded that petitioner's termination was not arbitrary, capricious or unreasonable. *Ibid.* The Arizona Adjutant General, General Van Dyke, accepted the hearing officer's recommendations on September 12, 1997. *Id.* at 6a-7a.

3. On August 28, 2000, petitioner filed this action in the United States Court of Federal Claims. Pet. App. 7a. Petitioner alleged that his termination was arbitrary, capricious, an abuse of discretion, not in accordance with law, in excess of statutory authority, and unsupported by substantial evidence. The complaint asserted that petitioner was entitled to reinstatement, back pay with interest, and a correction of his employment records. Petitioner asserted jurisdiction under the Tucker Act, 28 U.S.C. 1491(a)(1), and the Back Pay Act of 1966, 5 U.S.C. 5596.

The Court of Federal Claims dismissed the complaint, holding that neither the Tucker Act nor the Back Pay Act provided jurisdiction. The Tucker Act, the court explained, waives the United States' immunity to suit and accords the Court of Federal Claims jurisdiction "to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding tort." Pet. App. 10a (quoting 28 U.S.C. 1491(a)(1)). The Tucker Act, however, does not itself "create any substantive right enforceable against the United States for money damages." *Ibid.* (quoting *United States* v. *Testan*, 424 U.S. 392, 397-398 (1976)). Consequently, a plaintiff seeking to establish Tucker Act jurisdiction must demonstrate both that he is

asserting one of the causes of action for which the Tucker Act waives immunity, and that he relies on a statute or regulation that can be "fairly interpreted as mandating recovery of compensation from the government." *Ibid.* See also *United States* v. *Mitchell*, 463 U.S. 206, 216-217 (1983) (the plaintiff "must demonstrate" that the statutorily-recognized "source of substantive law he relies upon can fairly be interpreted as mandating compensation by the Federal government for the damage sustained") (internal quotation marks and footnotes omitted).[2]

The Court of Federal Claims concluded that petitioner had not identified an applicable money-mandating statute, regulation, or constitutional provision. Pet. App. 10a-12a. Rejecting petitioner's reliance on the Back Pay Act, the court explained that, under that Act, employees may receive back pay, with interest, when "an appropriate authority" finds "unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the pay." *Id.* at 11a (quoting 5 U.S.C.

[2] In addition to monetary relief, petitioner sought correction of his service records. In general, the Court of Federal Claims has jurisdiction to enter awards of money damages but lacks authority to grant declaratory or injunctive relief. See *Testan*, 424 U.S. at 397-398; *United States* v. *Alire*, 73 U.S. (6 Wall.) 573, 575-577 (1867); *Bonner* v. *United States*, 76 U.S. (9 Wall.) 156, 159 (1869); *United States* v. *Jones*, 131 U.S. 1, 9, 14-18 (1889). As an exception, 28 U.S.C. 1491(a)(2) accords the Court of Federal Claims authority to "issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records" as "an incident of and collateral to any" money judgment to "provide an entire remedy and complete the relief." The Federal Circuit has concluded that Section 1491(a)(2) allows reinstatement or correction of records only in a case where it is "tied and subordinate to a money judgment." See *James* v. *United States*, 159 F.3d 573, 580-581 (Fed. Cir. 1999). Petitioner does not appear to dispute that 28 U.S.C. 1491(a)(2) does not afford the Court of Federal Claims jurisdiction absent a proper jurisdictional basis for monetary relief under 28 U.S.C. 1491(a)(1).

5596(b)(1)). The Federal Circuit, the court continued, had interpreted the Back Pay Act as a remedial command to be followed when the plaintiff asserts one of the causes of action recognized in the Tucker Act, not as an independent cause of action for money from the government. Consequently, to establish Tucker Act jurisdiction, a plaintiff must show that the challenged personnel action violated a relevant statute or regulation covered by the Tucker Act. Pet. App. 11a. See *United States* v. *Connolly*, 716 F.2d 882, 887 (Fed. Cir. 1983) (no jurisdiction despite reliance on Back Pay Act where plaintiff "failed to show that his separation * * * violated any relevant statute or regulation covered by the Tucker Act"). Here, the court concluded, petitioner had not alleged the violation of such a statute or regulation. *Ibid.*

The Court of Federal Claims also concluded that, following this Court's decision in *Fausto*, the Back Pay Act does not give the Court of Federal Claims "jurisdiction to adjudicate the merits of an underlying personnel action." Pet. App. 12a. The Back Pay Act, by its terms, provides a monetary remedy where "an appropriate authority" finds that the employee suffered wrongful personnel action. This Court's decision in *Fausto*, the court noted, had concluded that, "under the comprehensive and integrated review scheme of the CSRA, the Claims Court (and any other court relying on Tucker Act jurisdiction) is not an 'appropriate authority' to review an agency's personnel determination." Pet. App. 12a (quoting *Fausto*, 484 U.S. at 454). Absent a finding of wrongful action by an "appropriate authority" such as the MSPB or the agency itself, the Court of Federal Claims stated, courts asserting Tucker Act jurisdiction lack authority to hear Back Pay Act claims. *Ibid.* Applying that holding here, the court pointed out that there "has not been a determination by an appropriate authority * * * holding that [petitioner's] termination was unwarranted or

unjustified. Indeed, the adjutant general concluded that [petitioner's] termination was proper." *Id.* at 12a-13a.

Finally, the Court of Federal Claims rejected petitioner's claim that, as a National Guard technician, he is "exempt[] from the CSRA, so that *Fausto* does not apply." Pet. App. 13a. The fact that "the CSRA specifically excludes National Guard technicians 'from its channels of administrative and judicial review' * * * does not mean" that petitioner may seek relief under an alternative remedial scheme such as those "in place before the CSRA's enactment." *Ibid.* (quoting *Booth* v. *United States*, 990 F.2d 617, 619 (Fed. Cir. 1990)). The Court of Federal Claims explained that, following *Fausto*, the Federal Circuit had held that "the CSRA expressly denies National Guard technicians judicial review in" the Court of Federal Claims. *Ibid.* (citing *Booth*, 990 F.2d at 620). The CSRA, the Court of Federal Claims explained, "exclusively governs federal personnel matters." *Id.* at 13a-14a. "Because National Guard technicians are excluded from the CSRA's administrative and judicial review options, the only review rights [petitioner] has are to appeal his case to the state adjutant general." *Id.* at 14a.[3]

4. The Federal Circuit affirmed in an unpublished opinion, holding that its earlier decision in *Booth* v. *United States*, 990 F.2d 617, 620 (1993), is controlling. Pet. App. 1a-3a. In *Booth*, the Federal Circuit "held that a National Guard technician employed pursuant to 32 U.S.C. 709 is not entitled to judicial review of an adverse personnel action."

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[3] The Court of Federal Claims rejected petitioner's apparent assertion that the Administrative Procedure Act (APA), 5 U.S.C. 553 *et seq.*, afforded it jurisdiction. Pet. App. 14a-15a. The APA, the court held, "is not a money-mandating statute granting * * * jurisdiction under the Tucker Act." *Id.* at 15a. Further, the court noted, "the APA is not an independent source of jurisdiction for any court." *Ibid.* Petitioner does not, before this Court, renew his claim that the APA provided the Court of Federal Claims with jurisdiction.

Pet. App. 2a. Petitioner, the court noted, "can not distinguish his appeal from the facts and law of *Booth*." *Ibid.* The court also rejected petitioner's invitation to overrule *Booth*. *Booth*, the court explained, "implements the Court's reasoning in *Fausto*," which held that "the CSRA does not include alternate paths of appeal for those few classes of employees for which Congress expressly denied appeal rights to the Merit Systems Protection Board." Pet. App. 2a-3a. The Federal Circuit stated that National Guard technicians were expressly excluded from access to judicial review, but noted that they had been "provided with a system of review within the National Guard structure." *Id.* at 3a. The Federal Circuit thus concluded that the Court of Federal Claims had properly dismissed the complaint for lack of subject matter jurisdiction. *Ibid.*

ARGUMENT

The unpublished decision below is correct and does not conflict with the decision of any other court of appeals. Accordingly, further review is not warranted.

1. Because the United States is entitled to sovereign immunity, it "may not be sued without its consent," and "the existence of consent is a prerequisite for jurisdiction." *United States* v. *Mitchell*, 463 U.S. 206, 212 (1983); *United States* v. *Testan*, 424 U.S. 392 (1976). When the government does consent to be sued, "the terms of its waiver of sovereign immunity define the extent of the court's jurisdiction." *United States* v. *Mottaz*, 476 U.S. 834, 841 (1986). Waivers of immunity, moreover, must be strictly construed in favor of the sovereign. *Department of the Army* v. *Blue Fox, Inc.*, 525 U.S. 255, 261 (1999); *Lane* v. *Peña*, 518 U.S. 187, 192 (1996); *United States* v. *Nordic Village, Inc.*, 503 U.S. 30, 33-34 (1992).

This case concerns the scope of the waiver of immunity contained in the Tucker Act, 28 U.S.C. 1491(a), and the availability of administrative and judicial review under the Civil Service Reform Act of 1978 (CSRA), 5 U.S.C. 1101 *et seq.*, as amended by the Civil Service Due Process Amendments Act, Pub. L. No. 101-376, 104 Stat. 461 (1990). Petitioner does not dispute that, in order to fall within the scope of the Tucker Act's waiver, he must *both* assert a claim based on one of the substantive sources of law the Tucker Act identifies—*e.g.*, a claim "founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States," 28 U.S.C. 1491(a)(1)—*and* "demonstrate" that the "source of substantive law he relies upon can fairly be interpreted as mandating compensation by the Federal government for the damage sustained." *Mitchell*, 463 U.S. at 216-217 (internal quotation marks and footnotes omitted); *Testan*, 424 U.S. at 400 (quoting *Eastport S.S. Corp.* v. *United States*, 372 F.2d 1002, 1009 (1967)); see *FDIC* v. *Meyer*, 510 U.S. 471, 484 (1994) (courts may not award damages against federal agency absent "a waiver of sovereign immunity" and a "source of substantive law [that] provides an avenue for relief"). Petitioner claims, however, that the Back Pay Act provides him with a substantive right to payment. That claim is incorrect.

The Back Pay Act authorizes a monetary remedy of lost wages, plus interest, if it "is found *by an appropriate authority*" that the claimant was "affected by an unwarranted or unjustified personnel action which resulted in a withdrawal or reduction in the pay." 5 U.S.C. 5596(b)(1) (emphasis added). In *United States* v. *Fausto*, 484 U.S. 439, 443 (1988), this Court held that, following implementation of the CSRA, "an appropriate authority would include the agency itself, or the MSPB or the Federal Circuit where those entities have the authority to review

the agency's determination." *Fausto*, 484 U.S. at 454. The Court, however, concluded that the Court of Federal Claims "(and any other court relying on Tucker Act jurisdiction) is not an 'appropriate authority' to review an agency's personnel determination." *Ibid.*

Petitioner does not claim that an "appropriate authority" such as "the agency itself, or the MSPB" has found that petitioner was subjected to unwarranted or unjustified personnel action. To the contrary, the Arizona Adjutant General, following administrative hearings and review within the agency, concluded that petitioner's dismissal was proper. Pet. App. 12a-13a. Under *Fausto*, that forecloses petitioner's reliance on the Back Pay Act. To the extent petitioner contends that the Court of Federal Claims, exercising Tucker Act jurisdiction, should be permitted to determine that his termination was "unwarranted or unjustified" within the meaning of the Back Pay Act, *Fausto* again forecloses his argument. "[A] court relying on Tucker Act jurisdiction," *Fausto* holds, "is not an 'appropriate authority' to review an agency's personnel determination." 484 U.S. at 454. Section 709(f)(4) of Title 32, moreover, provides that any "right to appeal" enjoyed by National Guard technicians such as petitioner does "not extend beyond the adjutant general."

Petitioner nonetheless asserts that "the inference of congressional intent to preclude judicial review drawn in *Fausto* * * * cannot properly be drawn as to [National Guard] technicians." Pet. 10. But here the inference is considerably stronger than it was in *Fausto*. In *Fausto*, Congress gave certain employees—competitive service employees and preference eligible excepted service employees who had completed one year of service—a right to administrative and judicial review in Chapter 75, but did not mention such rights for nonpreference eligible excepted employees. Relying on *Block* v. *Community Nutrition*

Institute, 467 US. 340, 345-348 (1984), the Court explained that "the omission of review procedures" for one class of affected individuals, "coupled with the provision of such procedures for" others, "was strong evidence that Congress intended to preclude" the former "from obtaining judicial review." 484 U.S. at 447-448. *Fausto* thus held that the "comprehensive nature of the CSRA, the attention that it gives throughout to the rights of nonpreference excepted service employees, and the fact that it does not include them in provisions for administrative and judicial review contained in Chapter 75, combine to establish a congressional judgment that those employees should not be able to demand judicial review for the type of personnel action covered by that chapter." *Id.* at 448.

Here, Congress did not merely *omit* mention of National Guard technicians from the CSRA provisions for administrative and judicial review. Instead, Congress enacted a statutory provision *expressly excluding* them from the CSRA provisions creating those rights. Thus, while Subchapter II of Chapter 75 of the CSRA establishes the right to administrative and judicial review of adverse personnel decisions such as dismissals, 5 U.S.C. 7511(b)(5) unequivocally declares that "[t]his subchapter," *i.e.*, Subchapter II, "does not apply to an employee * * * who is described in section 8337(h)(1), relating to technicians in the National Guard." Section 7511(b)(5), moreover, was added by the 1990 Civil Service Amendments, which were enacted in response to *Fausto* and with an awareness of *Fausto*'s holding. Further, the 1990 Civil Service Amendments accorded additional categories of employees (those "in the excepted service" "not serving a probationary or trial period" or who "completed 2 years of current continuous service") a statutory right to administrative and judicial review. See 104 Stat. 461 (codified as 5 U.S.C. 7511(a)(1)(C)); pp. 3-4, *supra*. But Congress deliberately

chose not to provide such rights to National Guard technicians. That can only mean that review of such terminations must be precluded under *Fausto*. If Congress's *omission* of a category of employees was persuasive evidence of an intent to withhold administrative and judicial review in *Fausto*, Congress's *express exclusion* of National Guard employees from the provisions authorizing such review in the wake of *Fausto* is conclusive evidence of the same intent here.

Contrary to petitioner's assertions (Pet. 6), that conclusion does not conflict with *DiLuigi* v. *Kafkalas*, 584 F.2d 22 (3d Cir. 1978), *Davis* v. *Vandiver*, 494 F.2d 830 (5th Cir. 1974), *Morris* v. *McCaddin*, 553 F.2d 866 (4th Cir. 1977), and *Chaudoin* v. *Atkinson*, 494 F.2d 1323 (3d Cir. 1974). Those cases predate the CSRA; they predate this Court's decision in *Fausto*; and they predate Congress's enactment of the 1990 Civil Service Amendments. As a result, they have no bearing on Congress's intent in enacting the CSRA or the 1990 Civil Service Amendments, or on the proper application of *Fausto* here. Most of those cases, moreover, involved constitutional challenges brought against individual officers, and many do not even address the issue of jurisdiction.[4] Some, like *DiLuigi*, actually support the

[4] *Chadouin*, *DiLuigi* and *Davis*, for example, were all due process challenges, not statutory claims, and all involved lawsuits filed against individual officers, not against the United States. The standards applied to those categories of claims are not necessarily the same. See *Webster* v. *Doe*, 486 U.S. 592, 604 (1988) (concluding that judicial review of statutory but not constitutional claims was precluded by statute because, "where Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear."); *Johnson* v. *Robison*, 415 U.S. 361, 373-374 (1974) (federal statute will not be construed to preclude judicial review of constitutional challenges absent clear and convincing evidence of congressional intent). Neither *Davis* nor *Morris*, moreover, mentions the basis for district court jurisdiction; they thus cannot be considered binding on that issue. See, *e.g.*,

decision below. "Congress," *DiLuigi* observes, "was conscious of the fact that most of the technicians would be in the noncompetitive or excepted category of civil service employment and hence, would not have the benefit of tenure or the procedural protection provided competitive-classified employees." 584 F.2d at 25.

Nor is the court of appeals' decision inconsistent with *Fausto* and *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 140 (1967), which recognize the presumption in favor of judicial review. See Pet. 7, 11-12. Here, there is convincing evidence that Congress intended to withhold administrative and judicial review. This Court's decision in *Fausto* found such an intent evident with respect to nonpreference excepted service employees based on the absence of a CSRA provision granting them a right to administrative and judicial review. Here, the intent to withhold review is evident from an express statutory provision, 5 U.S.C. 7511(b)(5), excluding National Guard technicians from the CSRA's administrative and judicial review provisions. See also 32 U.S.C. 709(f)(4) (declaring that any right to appeal "shall not extend beyond the adjutant general of the jurisdiction concerned").

The legislative history of the 1990 Civil Service Amendments confirms what the text makes clear. The House Report demonstrates that Congress, aware of this Court's holding in *Fausto*, intended to provide judicial review rights for certain members of the excepted service otherwise

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Pennhurst State Sch. & Hosp. v. *Halderman*, 465 U.S. 89, 119 (1984) ("[W]hen questions of jurisdiction have been passed on in prior decisions *sub silentio*, this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before us.") (internal quotation marks omitted); *United States* v. *Jones*, 225 F.3d 468, 469 (4th Cir. 2000) (earlier decision adjudicating the merits without addressing jurisdictional issue of sovereign immunity not binding on that question when raised in a later case).

covered by *Fausto* but decided to exclude National Guard technicians such as petitioner. H.R. Rep. No. 328, *supra*, at 4. The Committee noted that:

> The bill excludes National Guard Technicians. While the committee is sympathetic to the pleas for better protection the technicians have made, the committee also realizes it shares jurisdiction over these individuals, who are hired under provisions of title 32, United States Code, with the Committee on Armed Services. Rather than delay this legislation to work out legislation acceptable to the Committee on Armed Services, the committee will address the issue of protection for technicians in separate legislation.

Id. at 5. The legislative history also notes that exclusion of national guard technicians is "consistent with section 709(f) of title 32." It is thus clear that Congress could have accorded National Guard technicians a right to administrative and judicial review in the 1990 Civil Service Amendments, but chose not to do so.[5]

2. Petitioner attempts to avoid the effect of the CSRA, this Court's decision in *Fausto*, and the 1990 Amendments to the CSRA, by arguing that Congress intended to *exclude* National Guard technicians from the CSRA altogether. Congress, petitioner argues, intended to leave National Guard technicians free to pursue other remedies. Pet. 12-13. That argument too lacks merit.

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[5] Petitioner suggests (Pet. 7) that he has a constitutionally protected interest in his job, because 32 U.S.C. 709 allows termination "for cause." Petitioner, however, was granted all the process that was due, as the very cases cited by petitioner demonstrate. See, *e.g.*, *Davis*, 494 F.2d at 832 (plaintiff accorded "more than the Constitution required" when he was given "notice of the charges and reasons for removal, * * * the right to reply orally and in writing," and "a full evidentiary hearing after his termination").

As an initial matter, the CSRA "comprehensively overhauled the civil service system." *Fausto*, 484 U.S. at 443 (quoting *Lindahl* v. *OPM*, 470 U.S. 768, 773 (1985)). "A leading purpose of the CSRA was to replace the haphazard arrangements for administrative and judicial review of personnel action, part of the 'outdated patchwork of statutes and rules built up over almost a century' that was the civil service system." *Id.* at 444 (quoting S. Rep. No. 969, 95th Cong., 2d Sess. 3 (1978)). Petitioner appears to claim that Congress, contrary to its evident intent, actually sought to *retain* a patchwork of review mechanisms, at least with respect to National Guard technicians.

This Court, in any event, rejected an almost indistinguishable argument in *Fausto*. The respondent there argued that Congress's "exclusion of nonpreference excepted service personnel from Chapter 75" evidenced Congress's intent to "leav[e] them free to pursue other avenues of review," 484 U.S. at 449, including "so-called nonstatutory review," *id.* at 444, 445. The Court, however, concluded that "the absence of provision for these employees to obtain judicial review is not an uninformed consequence of the limited scope of the statute, but rather manifestation of a considered judgment that they should not have statutory entitlement to review for adverse action of the type covered by Chapter 75." *Id.* at 448-449.

The same is true here. Even after *Fausto* was decided, Congress specifically considered and declined to grant administrative and judicial review to National Guard technicians. Congress made that choice even though it granted such rights to other categories of employees, and despite "the pleas for better protection the technicians have made." See pp. 4, 15-16, *supra*. That does not mean that petitioner was without any remedy. As the Federal Circuit recognized, National Guard technicians have been "provided with a system of review within the National

Guard structure." Pet. App. 3a. But petitioner's appeal rights did "not extend beyond the adjutant general of the jurisdiction concerned." 32 U.S.C. 709(f)(4).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

ROBERT D. MCCALLUM, JR.
Assistant Attorney General

WILLIAM KANTER
DAVID M. COHEN
DAVID D'ALESSANDRIS
Attorneys

NOVEMBER 2002

Supreme Court, U.S.
FILED
NOV 15 2002
CLERK

(3)

No. 02-194

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2001

WILLIAM J. FLEMING,

Petitioner,

v.

UNITED STATES,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

REPLY TO BRIEF IN OPPOSITION

Daniel M. Schember
Gaffney & Schember, P.C.
1666 Connecticut Avenue, N.W.
Suite 225
Washington, D.C. 20009
202/328-2244

November 15, 2002 *Counsel of Record for Petitioner*

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The government erroneously argues that the decision below "does not conflict with the decision of any other court of appeals." Resp. Br. at 10. In *Chaudoin v. Atkinson*, 494 F.2d 1323 (3rd Cir. 1974), the court held that separation of a technician "for cause" under 32 U.S.C. § 709 is subject to judicial review. Contrary to the government's assertion, Resp. Br. at 14, n.4, the *Chaudoin* court upheld a statutory, not a constitutional, claim. The court held the technician's separation was not "for cause" within the meaning of the statute and implementing regulations. 494 F. 2d at 1330-1331. The government also is incorrect when it asserts that the claim in *Chaudoin* was "not against the United States." Resp. Br. at 14, n.4. The court expressly held that the defendant was "an agency or an agent of the United States." 494 F. 2d at 1330. In *Diluigi v. Kafkalas*, 584 F.2d 22, 23 n. 2 (3rd Cir. 1978), moreover, the court held that the Back Pay Act, 5 U.S.C. § 5596(b)(1), gives the district court Little Tucker Act jurisdiction, 28 U.S.C. § 1346(a)(2), to review the separation of a title 32 technician.[1]

The government erroneously argues that the *Chaudoin* and *Diluigi* decisions are distinguishable because they predate "the 1990 Civil Service Amendments" which

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[1] In *Diluigi* the court ruled for the government on the merits, finding that under valid regulations the technician was a probationary employee who could be separated without "cause." Contrary to the government's brief at 14-15, which quotes the court out of context, the *Diluigi* court did not hold that all excepted service title 32 technicians lack tenure and may be separated without "cause." Rather, the court noted that the legislative history of the statute states that excepted service title 32 technicians acquire "career status" after serving one year. 584 F.2d at 25. The court held "the clear import of the termination for cause provision was to accord all technicians an assurance of continuing employment similar to that given other federal employees." *Id.*

excluded title 32 technicians from title 5 adverse action review provisions. Resp. Br. at 14. The express statutory exclusion of title 32 technician adverse actions from title 5 review provisions has been in effect since 1968, when Congress first created the title 32 technician program. National Guard Technicians Act of 1968, P.L. 90-486, 82 Stat. 755 (August 13, 1968) (§§ 709(e)(5) and 709(f); *see Chaudoin v. Atkinson*, 494 F.2d 1323, 1325 n. 1 (3rd Cir. 1974)). The legislative history of the 1990 Civil Service Amendments confirms that the 1990 amendments made no change in this regard. H.R. Rep. No. 101-328 (1st Sess. 1989) at 5, 7. When the 1990 amendments were enacted, it was well established that title 32 technician separations are subject to judicial review in district court, and by suit in the Court of Claims under the Back Pay Act. *Polos v. United States*, 621 F.2d 385 (Ct. Cl. 1980); *Diluigi v. Kafkalas*, 584 F.2d 22 (3rd Cir. 1978); *Morris v. McCaddin*, 553 F.2d 866 (4th Cir. 1977); *Chaudoin v. Atkinson*, 494 F.2d 1323 (3rd Cir. 1974); *Davis v. Vandiver*, 494 F.2d 830 (5th Cir. 1974). Nothing in the text or legislative history of the 1990 amendments provides any evidence--let alone the required "clear and convincing evidence," *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967)--that Congress in 1990 intended to deprive title 32 technicians of their previously-recognized right to judicial review.

Nor can it be said that the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 *et seq.* (October 13, 1978) (CSRA), provides clear and convincing evidence that Congress intended to take away title 32 technicians' judicial review rights. As we pointed out in our petition, and the government's brief does not dispute, the 1978 CSRA "did not mention title 32 technicians at all." Pet. at 10. None of the factors which caused the Court to infer congressional intent to preclude review in *Fausto v. United*

States, 484 U.S. 439 (1988), applies to title 32 technicians. Pet. at 10-11.

Contrary to the government's brief at 17, judicial review of title 32 technician separations was not part of the "patchwork of review mechanisms" that Congress intended to replace in 1978. The "civil service system" that the CSRA "overhauled," Resp. Br. at 17, *quoting Fausto*, 484 U.S. at 443, was the title 5 system, not the title 32 adverse action system. The latter is outside title 5 and always has been. Given the consistent exclusion of title 32 technicians from the title 5 adverse action review system, changes to the title 5 system in 1978, making no mention of title 32 technicians, do not support an inference, let alone provide clear and convincing evidence, that Congress intended to remove judicial review from the title 32 system.[2]

Contrary to the government's brief at 11-12, *Fausto* did not hold that the Court of Claims was no longer an "appropriate authority" to determine whether *any* "personnel action" was "unwarranted or unjust" within the meaning of the Back Pay Act. The court below properly has rejected such an interpretation of *Fausto*. *Worthington v. United States*, 168 F.3d 24 (Fed. Cir. 1999) (Court of Federal Claims an "appropriate authority" under Back Pay Act to redress violation of Compressed Work Schedules

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[2] Like title 32 technicians, foreign service employees are not included in the title 5 adverse action review system; and the 1990 Civil Service Amendments expressly excluded them, as well, from that system. 5 U.S.C. § 7511(b)(6). This exclusion, however, supports no inference that Congress intended to eliminate judicial review from the foreign service system. Like the title 32 system, the foreign service system, which includes judicial review, 22 U.S.C. §§ 4131-4140, is not part of the "patchwork" that Congress intended to replace when it enacted the CSRA.

Act); *Romero v. United States*, 38 F.3d 1204, 1211 (Fed. Cir. 1994) (same; pay unlawfully withheld for taxes).

In *Fausto*, the Court held that, after the CSRA, the Court of Claims no longer was an "appropriate authority" to review those personnel actions that the CSRA intended not to be judicially reviewed at all. The Court of Federal Claims, however, is an appropriate authority to address a personnel action that has caused loss of pay where there is no clear and convincing evidence of congressional intent to preclude judicial review of that action. *Worthington*; *Romero*. *See also*, *Zervas v. United States*, 26 Cl. Ct. 1425, 1428 (1992) (Court of Federal Claims an "appropriate authority" under Back Pay Act to redress unlawful denial of grade and pay retention benefits); *Bailey v. United States*, 52 Fed. Cl. 105, 113 (2002) (same; unlawful denial of travel reimbursements).

Section 709(f)(4) of title 32, saying the "right to appeal" does "not extend beyond the adjutant general," is not clear and convincing evidence of congressional intent to preclude judicial review. Section 709(f)(4) limits administrative review; it does not preclude judicial review. *Chaudoin v. Atkinson*, 494 F.2d 1323, 1327 n. 5 (3rd Cir. 1974). The government does not argue that the *Chaudoin* court incorrectly decided this point. Rather, like the court below, the government argues only that the 1990 Civil Service Amendments and the holding in *Fausto* preclude judicial review of technician separations. Resp. Br. at 12-14. We have shown above, however, and in our petition, that the government's argument is incorrect.

Respectfully submitted,

Daniel M. Schember
Gaffney & Schember, P.C.
1666 Connecticut Ave., N.W.
Suite 225
Washington, D.C. 20009
202/328-2244

Counsel of Record for Petitioner

November 15, 2002